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Four Reflections on Law and Morality

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FOUR REFLECTIONS ON LAW AND MORALITY

MICHAEL S. MOORE*

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INTRODUCTION

Law and morality—my, what an old friend the topic for this Conference seems to me. Showing that law was infused with morality was my first topic in jurisprudence. Indeed, it is what drew me into jurisprudence at all. I was interested in philosophy *and* law long before I became interested in jurisprudence, that is, the philosophy of law. It was seeing law as a branch of ethics—as related intimately to morality—that made jurisprudence interesting enough for me to pursue it.

This was not just because I, like others in my generation of legal philosophers, grew up in the shadow of the Hart-Fuller debate (in which the relationship of law to morality was central).¹ It was rather because showing how law was part of morality made the abstract study of law, that is, legal philosophy—seem a more noble calling, not a mere *techne*, a trade, a matter for the sharp pencils crowd and legal jujitsu. Seeing law as obligating, at least of judges if not citizens, made law—and the question of law's nature—*matter* in a way that positivistic social sciences of law never did.²

I have organized my remarks around the four aspects of the topic of law and morality that have dominated my own jurisprudential scholarship and teaching these past four decades. The first is the relationship between the law that obligates judges, and morality: exactly how, in what ways, does that law relate to morality? The second involves the proper aims and limits of lawmaking in a democratic society: put simply, is it proper to legislate morality? The third is the nature of that morality to which the law that we either

1. The first salvo in this debate should probably be given to Fuller in his exchange with Ernst Nagel. See Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697 (1956). H.L.A. Hart responded to Fuller's arguments in his justly celebrated article, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Fuller's response was *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Fidelity*]. Hart restated his views in *THE CONCEPT OF LAW* (1961), and Fuller, his in *THE MORALITY OF LAW* (1964). Hart's response to the latter was Book Review, 78 HARV. L. REV. 1281 (1965). Fuller's rejoinder is in his *THE MORALITY OF LAW* (2d ed. 1969).

2. I chart the differences between Hart's positivistic and externalist, social science of law, and an internal jurisprudence guided by the stipulation that law necessarily obligates judges in their role as judges, in Michael S. Moore, *Hart's Concluding Scientific Postscript*, 4 LEGAL THEORY 301 (1998).

have, or ought to have, is related: is the justice part of “justice under law” real or conventional morality? The fourth is the content of that morality apt to be part of the law we have or ought to have: should law be concerned with virtue, or should it focus on rights and obligations only? If the latter, is it deontological or consequentialist morality that is of most relevance to law? If consequentialist, is it utilitarian or a more pluralistic consequentialism? If it is deontological, is it libertarian (natural right) or egalitarian (distributive justice) in nature? These are not just questions of the general shape of ethics and meta-ethics (although they are also that). They are also questions about that part of morality apt for law—justice, say, rather than personal virtue.

This is a laughably large set of topics. But one of the benefits of giving introductory remarks is that one can *introduce* a topic by painting only in bold strokes, and with a broad brush. And then, as one of our broad-brush-strokes-kind of presidents used to say, one can leave the troublesome details to the “fellas.”³

I. HOW DOES MORALITY RELATE TO THE LAW WE HAVE?

So the first topic: how is law related to morality? With apologies to Herbert Hart—who accused us American jurists of being “obsessed” with judicial behavior⁴—I still think that this question of how law is related to morality is best approached through *judicial* obligation. Provisionally at least, fix law as that which obligates judges in their role as judges, and then ask: how ought judges use morality in their decision of disputed law cases? So proceeding temporarily suspends the question of whether such morality—the morality judges are obligated to use in their role as judges—is or is not part of the law. By stipulative definition, assume for now that it is, and then ask the more practically interesting question: how should morality properly enter into judicial decisions?

3. See, e.g., RICHARD REEVES, *PRESIDENT REAGAN: THE TRIUMPH OF IMAGINATION* 15 (2005).

4. See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969-70 (1977).

A. *Morality in Judicial Reasoning*

I have killed as many trees as anyone on this topic, with over-long and rather elaborate argumentation.⁵ Yet at the end of the day it seems to me that there are only four, not very complicated ways that morality properly enters judicial reasoning. The first two stem from what I will call “the obvious law”—the stuff (like statutes) that everyone’s theory of law would classify as law.⁶

1. *The Explicit Incorporation of Morality by Obvious Law*

First is the explicit incorporation of morality by such obvious law.⁷ When statutes award custody of minor children to that parent most likely to further the *best interest* of the child, award citizenship only to those applicants possessed of *good moral character*, and deport those convicted of crimes of *moral turpitude*, they explicitly require judges to make moral decisions in the course of their making legal decisions. Likewise, when constitutions such as that of the United States require judges to review statutes to see whether they give the process that is *due* persons, protection of the laws that is *equal*, and respect each citizen’s rights to *free* speech, *free* exercise of religion, *freedom* from *unreasonable* searches and seizures, etc., they require judges to reach legal conclusions based on moral premises. Similarly, when the common law makes tort liability turn on whether one behaved *reasonably*, or when statutory law justifies what would otherwise be criminal conduct by a *balance of evils*

5. See Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989) [hereinafter Moore, *Unwritten Constitution*]; Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001) [hereinafter Moore, *Justifying the Natural Law Theory*]; Michael S. Moore, *Law as Justice*, 18 SOC. PHIL. & POL’Y 115 (2001); Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867 (1997); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) [hereinafter Moore, *Natural Law Theory*]; Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 188 (Laurence Goldstein ed., 1987); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981) [hereinafter Moore, *Semantics*].

6. Well, almost everyone. John Chipman Gray called such things the “sources of law,” to be distinguished from the law itself (which consisted of judicial applications in particular cases). See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 145-227 (1909).

7. See Moore, *Unwritten Constitution*, *supra* note 5, at 132-37; Moore, *Semantics*, *supra* note 5, at 242-46; Moore, *Natural Law Theory*, *supra* note 5, at 332-38.

defense, judges must make moral decisions in order to make legal decisions.

Such explicit incorporation of morality by the obvious law poses problems for some kinds of positivistic theories of law,⁸ but taking sides in such domestic debates is not here my concern. Irrespective of whether or not a legal theory can accommodate the fact and remain positivistic, it is unquestionably true that judges in legal systems with obvious law like ours have to make some kind of moral decisions in order to apply such laws to the cases before them.

2. Morally Justifying the Authority of Obvious Law

Second, there is what I shall call the regressive considerations of the thoughtful judge.⁹ Judges make people do things they do not want to do. With all the force of the state behind them, they coerce people into giving up their money, their liberty, their children, and their lives. Such coercion requires justification. The immediate justification for each occasion of judicial coercion is of course the (obvious) law itself: a judge might justify his judgment in a particular criminal case, for example, by a penal statute which directs him to so decide. But the thoughtful judge regresses the question of justification: what justifies the judge in regarding that criminal statute as imposing this obligation upon her? The answer is presumably in terms of some doctrines of legislative supremacy and the ban on common law crimes. But what makes those doctrines a source of judicial obligation? Presumably, some political ideals such as democracy, the separation of powers, and the rule of law. By this time the thoughtful judge is deep into the morality of such ideals even in applying the most obvious law to the most obvious cases.

8. The question currently debated is whether positivism can accommodate much explicitly moral content to the law, "soft" positivists urging that it can and "hard" positivists urging the contrary.

9. Hart and Kelsen were of course quite alive to the worries I am calling "the regressive considerations of the thoughtful judge." They famously sought to end such regress of justification with their ultimate tests of legal validity, the "rule of recognition" and the "grundnorm." Lon Fuller accurately pinpointed this as a weak point of positivism, urging that surely these constitutional norms themselves called for a moral justification in order to be authoritative for judges. Fuller, *Fidelity*, *supra* note 1, at 639. Dworkin then expanded Fuller's argument, tentatively at first, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 36-38 (1978), and then more completely in his later *Hard Cases* article, *id.* at 105-23.

The difference between a natural lawyer and a positivist does not lie in how judges should be thoughtful about the source of their obligations. Rather, the difference lies in seeing such ideals as the rule of law, democracy, and the separation of powers, as part of the standards that obligates judges in their role as judges, or, by contrast, as reasons not part of such standards even though they are reasons for playing such a role to start with. Consider a work-week metaphor: the positivist sees the judge while off the bench on Sundays, sitting by Hume's reflective fireside musing about the role of judging. The thoughtful judge sees that, as a person, she needs to justify the coercive job she does on Monday through Friday, and that the justification for continuing this job lies in ideals like democracy, the separation of powers, and the rule of law. Yet on Monday morning when she steps into role by putting on the judicial robes, those ideals drop away as she does her job. The ideals justifying the playing of the role, in other words, do not enter into how the role is played. The baseball umpire (to adopt the simple-minded simile of our new Chief Justice)¹⁰ may have to use morality to justify being an umpire at all, but once that is done and he is behind the plate, the values justifying his playing that role have no purchase on how to call the balls coming over the plate.

This attempt to cabin the recourse to morality by judges—they may use morality to justify the role but not use morality in playing the role so justified—sounds better than it is. I shall defer saying why until we have before us all four ways in which morality enters judicial reasoning.¹¹

3. *Morality in Hard Cases*

The third way is a very familiar one. It stems from the inevitable indeterminacies of the obvious law. Jeremy Bentham proclaimed that ideally we would draft a book of laws so comprehensive that citizens need but open the book to know the legal consequences

10. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005)* (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States).

11. See *infra* p. 1536.

attached to any possible action by them.¹² Bentham projected a ten-volume treatise on the science of legislation that he wanted to write, although he only completed the first of these volumes. But we all know that even if he had completed all the ten volumes, and even if he had written the code such volumes would have outlined, his ambition would have been hopelessly frustrated. "Fact is richer than diction," J.L. Austin once opined.¹³ The diversity of cases that inevitably arise outstrips the vocabulary and the imagination of any law-giver, no matter how talented.

Such indeterminacies make for what Lon Fuller called a "hard case."¹⁴ They are usefully grouped into four kinds.¹⁵ One are true cases of first impression, cases where there is no obvious law having any bearing on how such cases should be decided. Whether a spleen with unusual DNA (worth three billion dollars) can be property,¹⁶ whether surrogate motherhood contracts are valid,¹⁷ and the like, are arguably such kinds of cases. In such cases we have run out of obvious law.

A second kind of hard case also involves a lack of determinate precedent, but here the lack is not total. In the class of cases here considered, there is a precedent case "in the neighborhood," but the case up for decision is not on all fours with the precedent case. The indeterminacy here is rooted in the indeterminacy of specifying the holding of precedent cases. There is indeterminacy in specifying such holdings for two reasons: first, there is no canonical text for case holdings (as there are for statutes and constitutional texts); and second, when subsequent judges thus necessarily make their own generalizations about the rule of law for which a precedent case stands, they face an indefinitely large number of possible generalizations that cannot be ruled out by the obvious law. Judges thus

12. JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 343 (1945).

13. J.L. Austin, *A Plea for Excuses: The Presidential Address*, in 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1, 21 (1956).

14. Fuller, *Fidelity*, *supra* note 1, at 601-69. I have eschewed Dworkin's derivative notion of a hard case because he conflates truly indeterminate cases with cases that are determinate enough under obvious legal materials but are morally absurd.

15. Joel Feinberg divided hard cases along somewhat similar lines. See Joel Feinberg, *The Dilemmas of Judges Who Must Interpret "Immoral Laws,"* in PHILOSOPHY OF LAW 91 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

16. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

17. *In re Baby "M,"* 525 A.2d 1128, 1157 (N.J. 1987).

have considerable leeway to distinguish a precedent case rather than follow it, a power unchecked by the content of obvious law.

In such cases, what would we have a judge do? Should he flip coins? Have trial by combat? See whether the parties or their witnesses float when weighted down and immersed in a pond? Surely recourse to morality to decide such cases is not just preferable but obligatory on judges, as against recourse to arbitrary decision procedures such as these. In such a way morality enters into judicial decision making (again, leaving aside whether, apart from my stipulation, one wants to call the morality so used, "law").

Too much law can be as bad as too little law in creating indeterminacy. A third kind of indeterminacy arises when the obvious law contains two or more legal standards that apply to a given case, yet these standards require that incompatible legal remedies be given. If there is no priority rule between such standards, then the obvious law is without resources to decide this kind of a case either. As with cases of first impression, here too judges must use morality to render judgment.

Fourthly, even when the obvious law contains a legal standard that is both relevant to the decision of some case and not in conflict with some other, equally relevant legal standard, the obvious law may yet be indeterminate. I refer to the well known vagaries in the meanings of terms used in legal standards. Framed as such standards are in natural languages such as English, they are heir to the vagueness, ambiguity, metaphor, and open texture which infect all such natural language. This is such well trod ground that surely it needs no further elaboration.¹⁸ Nor does the implication for judicial decision making: here too judges must make moral judgments in order to pass legal judgment.

4. Moral "Safety Valves" and the Overruling of Obvious Law

The fourth way in which morality enters the law is the most interesting, both intrinsically and because it is the most controversial. I shall call this the "safety valve" route for infusing law with morality.¹⁹ Consider cases in which there is only one relevant legal

18. See Moore, *Semantics*, *supra* note 5, at 181-202.

19. See Moore, *Natural Law Theory*, *supra* note 5, at 354, 383-88; Moore, *Semantics*, *supra*

standard, thus presenting no problem stemming from a conflict of legal standards within the obvious law; further, that standard incorporates no moral evaluations in its terms; and further, those terms are not vague, ambiguous, or in any other way indeterminate in their normal semantic application to such cases. The legal judgment in such obvious applications of such non-conflicting, relevant, clear legal standards thus need involve no moral judgments by judges (holding in abeyance the second point above, the moral judgments needed to justify the obligatory force for judges of such obvious legal standards).

Yet in some of such cases the obvious law cries out to be saved from itself. In some of such cases the obvious application of the obvious law will be obviously wrong—unjust, otherwise immoral, contrary to what any law maker could have wanted, contrary to a rule's purpose, or just plain stupid or absurd. Examples: the obvious law without exception requires that the gates of the city should be closed in time of war—does that forbid the opening of the gates when the city's own defenders seek entry to escape their enemies?²⁰ The obvious law prohibits vehicles from being in the city park—does that forbid a veteran's group from placing a fully operational truck on a pedestal as a war memorial?²¹ The obvious law prohibits sleeping in the train station—does that require the conviction of the ticketed passenger who nods off while waiting for his afternoon train?²² The acquittal of the homeless person who has spread out his belongings for the night but is not yet asleep?²³ The obvious law by its terms forbids the taking of protected species such as certain turtles—does that forbid a fisherman from taking a wounded turtle to the center for marine mammals for treatment?²⁴

By the natural grammar of English, a criminal statute requires one who transports a visual depiction of sexual activity by minors

note 5, at 277-81.

20. See the hypothetical of Thomas Aquinas. *Summa Theologica*, First Part, Part II, Q. 96, Sixth Article, in THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 67-69 (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan trans., Hackett Publishing Co. 2d ed. 2002).

21. See Fuller, *Fidelity*, *supra* note 1, at 663.

22. See *id.* at 664.

23. See *id.*

24. *In re Lazara Herrera*, 40. O.R.W. 93 (Dept. of Commerce Feb. 13, 1985).

only to *know* that it is a visual depiction that he is transporting, not that it is a depiction of sexual activity or that minors are depicted—does that require the conviction of a bookstore owner who reasonably enough had no idea that some of the books he transported to his store were sexually explicit or involved minors?²⁵ A federal criminal statute forbids the obstructing or retarding of the passage of the U.S. mail—does that require the punishment of a state sheriff who arrests a murderer on probable cause if that arrest takes place while that murderer was carrying the U.S. mail?²⁶ The state statute law gives property to whomever is named in a valid will—does that require that the legatee named in such a will receive the property devised to him if he murders the testator in order to get it?²⁷ By proclamation the king forbids commoners from addressing the king unless he first addresses them—does that forbid commoners from warning a silent king that a coach is about to run him over?²⁸ Seventy-odd years of common law precedent bar suits in torts against manufacturers by those injured by negligently manufactured products, unless those consumers bought directly from (are in “privity of contract” with) those manufacturers—does this bar the suit by such injured consumers when the patterns of distribution (for the product that injures them) have changed to the point that the *only* persons likely injured by such defective products are such consumers?²⁹ Fifty-odd years of constitutional precedent make clear that public facilities may be segregated by race so long as they are equal in function—does that permit segregated schools in Topeka in 1954?³⁰ The U.S. Constitution plainly requires each state to have a republican form of government—does that obligate U.S. judges to review the form of state governments to see if they pass muster here?³¹

25. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). I discuss the case at length in Michael S. Moore, *Plain Meaning and Linguistics—A Case Study*, 73 WASH. U. L.Q. 1253 (1995).

26. *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868).

27. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

28. As depicted in the cartoon *The Wizard of Id*, B. Parker and J. Hart (Dec. 17, 1967) (on file with author). In the cartoon, after the king is run over by the coach he moans, “What happened?” Now the literalist commoners can speak; they shout, “Look out!”

29. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

30. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

31. This is a classic example of a “nonjusticiable” controversy that nonetheless clearly

In these and many other cases there is a strong cadre of legal theorists who urge judges to save the obvious law from itself. Judges are urged to overrule outdated or badly reasoned precedents, and overrule the plain meaning of statutory or constitutional language. Aquinas talks of overruling the letter of a statute with its spirit,³² Fuller, of using the purpose of a statute and not its ordinary English semantics,³³ Dworkin, of prioritizing a principle over a rule,³⁴ and Cardozo, of saving the common law from rigidity in the face of changes in what Holmes called "the felt necessities of the times."³⁵ These all come to much the same thing: a judge should use morality to declare the obvious law not to be what obligates either him or the citizens he judges, in cases where the obvious law leads to such absurd results.

There is of course a dissenting view here. St. Augustine urged judges to stay with the letter in such cases—otherwise, Augustine argued, they arrogate to themselves the power of the law giver.³⁶ Similarly, judges in our own times have urged their fellow judges to stick with the obvious law, no matter how absurd its applications. Warren Burger famously declared that it was not the job of a judge to prevent the Endangered Species Act from rendering useless a one hundred million dollar dam;³⁷ Frank Easterbrook has said he would send the state sheriff to jail for obstructing the mail in the case earlier referenced,³⁸ if he could have gotten the votes, Nino Scalia would have sent the innocent book dealer to jail in the child pornography case in order to follow the grammar of the poorly drafted statute.³⁹

It is easy enough to see what drives such dissenting views. A large part of the motivation here is what I call the conservative

arises under the text of the U.S. Constitution. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

32. See Aquinas, *supra* note 20.

33. See Fuller, *Fidelity*, *supra* note 1, at 663.

34. See DWORKIN, *supra* note 9, at 14-130.

35. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, Lecture III (1921).

36. Augustine is so quoted in AQUINAS, *supra* note 20.

37. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

38. Frank Easterbrook, Statement at the Federal Judicial Center's National Seminar for Judges of the Courts of Appeals (1995) [hereinafter Easterbrook, *Statement*].

39. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 80 (1994) (Scalia, J., dissenting).

temperament. This is the temperament that prefers a clear line to a fuzzy line, even when the clear line is clearly drawn in the wrong place. Another motivation, confined to statutory interpretation, is that explicitly stated by Frank Easterbrook: "Sometimes the best way to change a statute is to enforce it by its terms."⁴⁰ Nino Scalia's chastisement of poor legislative draftsmanship belies a similar motivation. On the Easterbrook/Scalia view, if legislators know that judges conceive of their job as simply following the obvious law no matter where it leads, then it will force those legislators to do their job more conscientiously. Thirdly, there is the respect due to the ideals of democratic self-governance and the separation of powers. In this view, it is only the words of the legislature that have the imprimatur of democratic promulgation. Judges therefore must treat all such words with equal respect, even when doing so is an affront to common sense. Lastly, the rule of law virtues of having law capable of generating reliable predictions of legal consequences is said to argue for sticking with the obvious law—for that is what will be obvious to citizens who care to look up the law.

Some of these considerations are plainly of greater merit than others. (Scalia's arrogance vis-à-vis poor draftsmanship in the legislature, for example, is as naïve as Bentham in its assumption that codes could eliminate such absurdities—as Aristotle saw long ago,⁴¹ such absurdities are inevitable in any system of general rules.) Yet whatever their merit, surely the goodness of their reinforcement in a particular case has to be balanced against the substantive goodness achievable if the obvious law is put aside. And equally surely, sometimes that balance must tip against the conservative values behind the obvious law. State sheriffs should not be punished for arresting murderous mail carriers, those rescuing turtles should not be prosecuted for taking them, murderous legatees should not inherit from their victims, consumers should be able to sue manufacturers in negligence when such consumers are the parties foreseeably hurt by negligence in manufacture, etc.

This then is the fourth way in which morality enters judicial reasoning—to put some play in the joints of an otherwise too rigid, unchanging, and formalistic legal code. It is interesting how this

40. See Easterbrook, *Statement*, *supra* note 38.

41. LEARNED HAND, *THE BILL OF RIGHTS* 21 (1958).

fourth route for morality also shows why the second consideration above also is a route by which morality necessarily enters law. Recall the second set of considerations above, of the judge thoughtful of her obligations to apply the obvious law. What the "safety valve" considerations show us is that the "obvious law" is not always what obligates a judge; when the obvious law is too unjust, too absurd, etc., the obligation of a judge is to "overrule" it, control its "letter" by its "spirit," hold it "nonjusticiable," etc. In which case, notice that no matter how obvious the obvious law may be, it is always a question for a judge whether the values justifying a deferential judicial role outweigh, or are outweighed by, the values disserved by absurd applications of the obvious law. Even if the answer is obvious—that the obvious law should be followed—it does not mean that the question was not asked.⁴²

The omnipresence of the question of whether the obvious law should be followed means that one cannot confine the values justifying a limited judicial role to outside-of-role, "Sunday" musings. Rather, such values enter into each application of the obvious law by a judge, for each application requires a balance of those values against the potential injustice of applying such obvious law to the case before a judge. The values justifying a limited role for judges thus, in this way, enter into the playing of that role by judges. They cannot be sealed off in the way suggested earlier.

B. Morality in the Law

We now need to address the question suspended earlier, viz, whether the morality judges ought to use in their reasonings as judges should be seen as being part of the law. I suspended this question because (as I have long thought) the practical question is more interesting. How judges should reason has direct payoffs in the real world in a way lacking in more theoretical questions.

But now suppose we all agree: judges should reason in the four ways outlined earlier. Now we should ask the more theoretical question: how should we conceptualize what judges ought to do as judges? Are they in such cases following the law? If so, the law must

42. See Moore, *Semantics*, *supra* note 5, at 280-81.

include the morality they are following. Or are they going against the law in the name of something else, that is, morality (on this view, misleadingly labeled, “the higher law”)?

Legal positivists have a perfectly understandable way of conceptualizing what judges ought to be doing in my four kinds of cases. About legal standards incorporating moral standards, they can admit that judges should look to such incorporated moral standards, but deny that the morality of such standards has anything to do with their legality. On this view, it is the enactment of such standards that alone confers legal status; their moral content is irrelevant. In which case judges are concededly making moral judgments in determining the content of such standards, yet such moral reasoning is not part of distinctly legal reasoning—that is confined to judicial determination of the facts of enactment and judicial enforcement of such standards. In that sense, the morality judges here should use need not be considered part of the law. Likewise for cases where the obvious law is indeterminate: a positivist could advise judges to look to morality because there is no law in such cases. Because of this latter fact, such use of morality by judges does not evidence some link of morality to law. When the judge makes some law by his decision, the law that is made may be morally correct, but it will still be law only because it was laid down by the judge and not because it is morally correct. And, as for cases where the obvious law cries out for correction, a positivist too can urge judges to overrule precedent, overrule plain statutory meaning, hold constitutional provisions nonjusticiable, etc.—only when the judge does this, he is *changing* the law. In which case, again the law itself (both before and after it is changed) is free of any moral taint. The natural lawyer’s alternative way of conceptualizing these judicial obligations, of course, is to deny both that the obvious law is all the law there is, and that the “obvious law” is in fact always law.

We thus face a conceptual choice that is not obvious. The positivist keeps our notion of law simple—law consists of all and only the obvious stuff; but the ethics of judicial obligation then becomes complicated because judges (even in their role as judges) are not always obligated to follow the law, nor are judges limited in their judicial obligations to the law alone. The natural lawyer keeps

our ethics simple: judges are always obligated (in their role as judges) to follow the law and nothing but the law; but the notion of law now becomes complicated, because the law is not only, and not always, what we take to be obviously law.

I have always plumped for the latter, natural law conceptualization.⁴³ Among other things, it alone can accommodate the intuitive thought that the judicial role is defined by a judge's obligation to follow the law. In addition, it is the only view that can make sense of the idea that there are singular propositions of law, decisive of cases, which are true before the judge deciding those cases makes them true by his decision. But I do not intend to rehearse these and other well-worn arguments here.

II. HOW DOES MORALITY RELATE TO THE LAW WE OUGHT TO HAVE?

I move now from the relation of morality to the law that binds judges, to the relation of morality to the content of what ought to be law in a liberal, democratic state. I move, thus, from the judicial role to the legislative role. Legislators, no less than judges, need a theory of their role, a theory about what are and are not proper ends to be sought via legislation.⁴⁴ These ends are not themselves necessarily law—for they are to guide the making of law, not to be that law already.

A simple theory of the legislative role would be a representational theory.⁴⁵ On this theory, a legislator should simply represent accurately the views of his or her constituents, whatever those views might be. This is a proceduralist theory because it admits of no substantive ends that guide or limit legislation. Such proceduralist (or majoritarian) theory seems to be what J.F. Stephen had in mind when he urged against Mill that in a democracy there could be no principled limits to legislation, such as Mill's harm principle purported to be.⁴⁶ Stephen's is one conception of the role of a

43. See sources cited, *supra* note 5.

44. On the theory of legislative aims, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 639-65 (1997).

45. See *id.* at 640-42.

46. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1873).

legislator in a democracy, but it is not the only one. The right of the majority to rule, the hallmark of a democracy, need not be realized on a daily, issue-by-issue reflection of majority will. Teddy Roosevelt, as one famous contrary example, viewed elective office as the famous “bully pulpit” from which one led the electorate. If they did not like the direction of the leadership, they regularly had the opportunity to throw it out—that would be democracy at work. But unless and until they do, legislators should legislate by their own best lights. That requires some substantive theory of proper legislative ends.

My sympathies have long been with the “bully pulpit” view of democracy.⁴⁷ (Not only is it better, but it also allows for a more interesting discussion.) Where do we find a theory of proper legislative ends? The obvious answer, of course, is “morality.” Where else would they be? Analogize the legislator to a judge deciding those hard cases where there is no obvious law on the subject. I earlier opined that recourse to morality by judges in such cases was surely to be preferred to flipping coins, or to some other arbitrary decision procedure.⁴⁸ *Mutatis mutandis* for legislators. As John Austin said, in contrasting legislators with judges, “all human laws ought to conform to the Divine laws.... [H]uman lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard.”⁴⁹

It is remarkable that a century and a half of liberal political theory has called into question Austin’s crisp conclusion. Bentham’s other famous mentee, John Stuart Mill, was the original culprit here. For Mill thought that one of the aims forbidden to legislators in a liberal democracy was the aim of legislating morality. Only legislation aimed at preventing behavior harmful to others was proper; legislation aimed at promoting morality was as much condemned by Mill as was paternalistically motivated legislation.⁵⁰

Mill has been succeeded by generations of liberal theorists attempting alternative ways of condemning what is often called

47. MOORE, *supra* note 44, at 640-42.

48. See *supra* p. 1531.

49. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184-85 (1954).

50. JOHN STUART MILL, *ON LIBERTY* 3-19 (Currin V. Shields ed., Liberal Arts Press 1956) (1859).

“morals legislation.” For example: the state should not coerce or encourage any moral conception of the good life; the state should at least be neutral between competing conceptions of the good life; the state should refrain from legislation on moral matters where there is no overlapping consensus; the state should only provide the fair framework in which differing moral visions can compete; etc.⁵¹

The critique of Mill and these post-Millian liberalisms is very simple. If something is morally good (right, just, etc.), that gives each of us a reason to promote its attainment. That is as true of legislators as of anyone else: if laws can be made that promote justice, there is good reason to make such laws. There are of course many qualifications to this simple starting point. Uncertainty about what is just may stay the legislative hand; as may doubts as to the efficacy of legal sanctions to bring about certain morally good things, such as virtue; as may the inevitable costs of using the clumsy instrument that is the law; as may the respect due to groups that autonomously make suboptimal moral choices.⁵² Even so qualified, Austin’s simple point is secure: the world is better if it is morally better, and to the extent legislators can achieve that moral betterment through law, they should do so.

Such “legal moralist” legislators can be as liberal as one pleases in the legislation they propose. How liberal they are depends in part on the strength of the various qualifications mentioned earlier. It also depends on the structure of the morality they would enact into law. If that morality contains such items as a general right to liberty, then a moralist legislator should respect that part of morality too. And if (as I think is plausible) such right to liberty does not end where our obligations begin—if we have a right to do wrong in some cases—then the legislative hand may be stayed considerably, on issues like assisted suicide, euthanasia, abortion, sexual preference, etc.⁵³

The third thing making legal moralist legislators liberal is the content of first order moral norms themselves. If you believe as I

51. Some of these latter day liberalisms are explored in JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

52. See MOORE, *supra* note 44, at 661-65.

53. See *id.* at 739-95; see also Michael S. Moore, *Freedom*, 29 HARV. J.L. & PUB. POL’Y 9 (2005).

do—that the morality of both virtue and of obligation is simply silent on sexual matters, such as what organ one puts into what orifice of what gender of what species—then it requires no recourse to a right to liberty to stay the legislative hand on laws regulating sexual behavior. This is where liberals should pitch their battle lines. They should not be arguing that it is wrong to legislate morality; rather, their honest argument is that in areas like sexual behaviors, it is the wrong morality that has been legislated.

Surely this was the motivating kernel of Mill's brand of liberalism. What Mill's harm principle really is is not a limit on proper legislative aim; it is a theory of when behavior is morally wrong. Most harming of others without their consent is morally wrong, and most seriously immoral wrongs consist of causing such harms. In which case, unconsented-to-harm-causing is a good, if rough, proxy for the kind of serious moral wrongdoing that is the proper target of legislation.

Austin thus had it right: of course we should be legislating morality. The law we ought to have should be as near to morally correct as we can make it.

III. SHOULD REAL OR CONVENTIONAL MORALITY BE PART OF THE LAW?

I come now to morality itself. There are two issues I wish to examine here. The first is a meta-ethical issue: is the morality that is and ought to be a part of the law real or conventional morality? Is it, in other words, the moral beliefs shared by citizens, the *mores* of our society? Or is it what some call "critical morality," and what I call real (or the correct) morality, the subject of our committed, first person beliefs?⁵⁴ The second issue is a substantively ethical question, albeit at a rather abstract level: is that morality utilitarian? Or more broadly consequentialist in character, including justice as something to be maximized? Or is it non-consequentialist, categorically demanding of legal actors' conformity to its norms

54. The distinction between correct morality and conventional moral belief is the subject of three long articles by me. See generally Michael Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 *LAW & PHIL.* 619 (2002); Michael Moore, *Moral Reality*, 1982 *WIS. L. REV.* 1061; Michael S. Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424 (1992).

“whatever the consequences?” I shall examine the first issue here and the second in the succeeding section.

I assume without argument (here) that meta-ethical relativism is false.⁵⁵ For if it were true—if a moral proposition like “bullfighting is wrong” meant or presupposed that most people believed bullfighting to be wrong—then there would be nothing to discuss here. For necessarily, wherever the law included morality it would include conventional moral beliefs.

The argument for use of conventional moral beliefs that interests me proceeds not from necessity but from desirability. The idea is that it is right—really right—to look to popular, generally accepted moral beliefs when questions of morality arise in the law. That at least is the shape of the conclusion. What would be the reason(s)?

A. Epistemic Deference

1. The Supposed Wisdom of the Many

People who argue in these directions often profess a kind of humility. They profess to find moral questions really difficult; they profess uncertainty both about answers, and about how to rationally defend their answers, to moral questions; they even express doubt about whether there are any answers here; and they wonder whether they have the right to impose their answers on others. So they profess to defer to majority belief on moral matters.

I want to separate such deference into two strands. One is epistemic: the idea is that, in light of the doubts about one’s own judgment in moral matters, one should defer to others’ beliefs because of their greater likelihood of being true. This is a kind of Burkean deference.⁵⁶ Morality is just too hard for us, so we should defer.

I often wonder whether anyone really believes this. Everyone has quite a few firmly held moral beliefs. Is it likely that they can/

55. See, e.g., Heidi M. Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417 (1988), revised and reprinted in HEIDI M. HURD, *MORAL COMBAT* 27-62 (1999).

56. I explore such Burkean deference in Michael Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL’Y 263 (1996).

should/will render those beliefs doubtful because many others disagree with them? If truth in morality is really so hard to achieve, why defer to others, who surely are as muddled as are you? Does the *number* of muddled people likely decrease the muddle? Surely a cacophony of muddle is more muddled, not less.

It is thus no surprise that those who profess to defer to majority belief on epistemic grounds “defer” only in the most Pickwickian sense of the word. Take Dworkin as a case in point. Does anyone believe that Dworkin is merely cohering the presupposed moral beliefs of the American legal system when he discovers, everywhere and always, his own political philosophy in such beliefs?⁵⁷ Or consider Thurgood Marshall’s use of what most people would believe if “fully informed” about the death penalty in order to interpret the Eighth Amendment⁵⁸—did that differ *at all* from what Marshall himself believed to be true? There is in fact no good epistemic reason to defer to other people’s moral beliefs, and the people who pretend to, don’t.

2. Conventions as Heuristics

There is a related epistemic argument for use of conventional morality in law, but it is distinct and merits separate mention. This is the idea that perhaps conventional morals are a good heuristic to true morality. Perhaps the awesome questions of true morality are too much for us—whether a particular murderer really deserves to die, for example. So perhaps we do better to hide the awesomeness of moral decision, and just pretend we are doing the less emotionally charged task of discovering what most people do or would think about the question.⁵⁹ In which case, we use conventional morality, not because it is more likely to be true than are our own views on

57. As an example, consider Dworkin’s attempt to show that the pre-Civil War U.S. Constitution, and the morality that best made sense of it, contained “a conception of individual freedom antagonistic to slavery.” This, despite the explicit compromises about slavery in pre-Civil War America. Ronald Dworkin, *The Law of the Slave-catchers*, *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437 (book review).

58. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

59. Abraham Goldstein once opined that jurors might do better with vacuous tests of responsibility so long as they purport to be factual, for that relieves jurors of the “trembling hands” incident upon fully self-conscious judgments of moral responsibility. ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* 81-82 (1967).

true morality, but because thinking about conventional morality gets us to our own best views of what true morality requires.

Yet surely simple heuristics are generally to be preferred to oblique ones. Usually the best way to hit a target is to aim at it. This is particularly true of moral insight. Far from distracting our cognitive abilities, our emotions need to be engaged for us to maximize our cognitive abilities with respect to moral belief. It is the dry, wooden sociology of others' beliefs that is the danger here, not our passionate commitment to our own.⁶⁰ Dry recitation of a sociology of moral belief does not engage us, does not make us take responsibility, does not make us think hard. We accept wooden applications of moral shibboleths in a way we could not if we are seeking directly what is morally required of us. Indirection (through conventional moral belief) is a worse, not a better, heuristic to true morality.

B. Democratic Deference

Somewhat more plausible, perhaps, is deference based not on the fact that conventional moral beliefs are *correct*, but on the fact that they are *conventional*, that is, they are what most people think. Such respect for majoritarian belief could be based on democratic ideals—the majority's right to be wrong—or on what might be called, "Munich ideals," that is, social peace and harmony is worth the price of living under incorrect moral beliefs.

1. In the Law We Ought To Have

Suppose these democratic and "peace-at-any-cost" ideals convinced one to use conventional morals whenever morality enters the law. How would that play out? Take first the legislative use of morality, to "legislate morals" as is called for by a legal moralist theory of legislation. Suppose the morals we are to legislate are what most people believe is moral, not what we the legislators ourselves think to be truly moral. Now Mill's arguments against legal moralism come into their own.⁶¹ After all, if legal moralism

60. Moore, *Natural Law Theory*, *supra* note 5, at 392-93.

61. See MILL, *supra* note 50, at 91-113.

urges that *conventional* morals be made the basis of legislation, then it is in truth no different than J.F. Stephen's more direct majoritarianism. This conventionalist legal moralism would mean that there are no principled limits to what may be legislated by a majority. Lord Devlin showed us this in his debate with Herbert Hart in the 1960s.⁶² Combine Devlin's conventionalism about morals with his legal moralist theory of legislation and you end up with nothing different than Stephen's simple majoritarianism of a century before.

Seeing this makes it easy to see why Mill thought he should be arguing against legal moralism as much as against legal paternalism. For example, Mill was outraged by the Americans' proposal to launch an expedition into the Utah Territory to stamp out (what most Americans believed to be) the immoral Mormon practice of polygamy.⁶³ Mill took this to be an example of legal moralism doing its pernicious work. Yet what if Mill thought that polygamy was deeply immoral, perhaps like female circumcision in certain African tribes. Would not his outrage have been eliminated—because then, the Americans would have been legislating *true* morality and not (a largely incorrect) conventional morality about sex. Mill surely thought (as do I) that polygamy was no big deal morally speaking, and therefore that using the coercive force of the law to stamp it out was unjustified. In which case, Mill's real target was the use of *conventional* morals as the basis of legislation, not the use of morals as such.

2. *In the Law We Have*

Now turn to morality in the law we have, the law that obligates judges in their roles as judges. As we saw, there are four ways by which morality enters into the law we have, and let us consider how it looks if we plug conventional morality in at each of these four points.

(1) *The explicit incorporation of moral standards into legal standards.* Consider the constitutional case first. As noted earlier, the U.S. Constitution explicitly requires moral judgments by judges

62. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

63. MILL, *supra* note 50, at 111-12.

as they exercise "the great power" of judicial review. Despite the rhetoric of many Supreme Court opinions—that judges should look to "those canons of decency and fairness which express the notions of justice of English-speaking peoples,"⁶⁴ "the evolving standards of decency that mark the progress of a maturing society,"⁶⁵ "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"⁶⁶ "the most specific level at which a relevant tradition ... can be identified,"⁶⁷ etc.—using conventional morality in exercising the power of judicial review makes no sense. For remember, what is being reviewed is the product of consensus moral beliefs—a statute enacted by a representative legislature. It makes little sense for a court to use that same conventional morality to review an expression of it by a more representative body. As John Hart Ely asked several decades ago, between the two institutions, a legislature and a court, is there really any doubt as to which more likely reflects conventional moral sentiment?⁶⁸

This general point is reinforced by a point specific to the rights-protecting clauses of the United States Constitution. Such rights become important when their support does not command a majority so that they will not win out in the political process. The idea that there are such minority rights against majority views again makes little sense if these rights are given conventional—that is, majoritarian—interpretations. A right good against the majority only when the majority agrees with it is not much of a right.⁶⁹

These arguments are unavailable when it is not constitutional law that incorporates moral standards, but is common law or statutory law, so let me turn to those. One argument common to all three kinds of law is based in language use. On the theory of meaning I have long thought correct, when we speak we ordinarily refer to things whose nature guides our meaning.⁷⁰ If I request that

64. *Rochin v. California*, 342 U.S. 165, 169 (1952).

65. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

66. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

67. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

68. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67 (1980).

69. See Moore, *Natural Law Theory*, *supra* note 5, at 395.

70. See *id.* at 291-301.

you “prospect for gold,” I expect you to bring me stuff that is really gold; “fool’s gold,” or other stuff commonly thought to be gold, will not be what is meant. The same is true of moral usages. If legislatures direct judges to find wherein lies the best interest of a child, or whether a petitioner for citizenship does or does not possess good moral character, they like all other speakers should be construed to mean what is really best or good, not what most people think is best or good.⁷¹

It is possible of course, for prior judges, legislatures, or constitutional conventions to mean something else. It is possible they meant for judges to look to popular moral beliefs. It is even possible they meant for judges to look to *their* (the law-givers’) moral beliefs on these matters, whether such beliefs were conventionally accepted or not. But absent some special context making the existence of these special interpretive intents plausible, surely law givers should be seen like other language users. Judges are to ascertain where the child will really be better off, not guess at what most people would think on the matter.

(2) *The justification of the obvious law by the thoughtful judge.* As we have seen, the thoughtful judge justifies her use of obvious law like statutes by political ideals such as democracy and the rule of the law. It is this exercise that justifies judges in using the coercive power of the state to order the litigants before them to give up their property, their liberty, their children, and their lives. It is inconceivable to me that judges could (or should) ever feel satisfied in this justificatory task, if they repaired only to conventionally accepted versions of democracy, the rule of law, etc. For notice how personal is this question: “What justifies me in doing what I am about to do?” That others think it fine cannot answer for me. “Do I think it’s fine?” is the relevant question, and for that question only ideals which I accept as true can fit the bill.

(3) *Filling in the indeterminacies in the law in hard cases.* In cases of conflicting legal standards, cases of first impression, and cases of penumbral application of legal standards—Fuller’s and Feinberg’s “hard cases”⁷²—conventional morals have perhaps their most plausible use. For if one thinks of these cases in the familiar similes

71. See *id.* at 320-38.

72. See *supra* notes 14-15.

of Cardozo⁷³—as “molecular” or “interstitial” legislation—then the judge faces the same choice as any other legislator. Namely, the choice between two conceptions of democratic legislation earlier described: should he reflect popular opinion or lead it with his own principled views? The fact that these “legislators”—that is, judges in hard cases—are not subject to the discipline of frequent, regular election might incline one away from the “bully pulpit” conception for which I earlier argued.

As many legal philosophers subsequent to Cardozo have noted,⁷⁴ the “little legislator” view of judges in hard cases does not reflect the continuity judges rightly sense between what they do in hard cases and what they do in easier ones. On the “molecular legislation” view, judges do two quite different things: in easy cases they apply the law, and in hard cases they resolve disputes without aid of law (while they are making new law to govern future disputes). Both sides of this description seem inadequate. In easy cases, judgment is required about whether a semantically easy case is a morally easy case too, or whether the safety valve questions we discussed earlier do not need to be brought into play. In hard cases there is an extension (elaboration, interpretation) of what went before, not the fresh beginning suggested by the phrases “dispute-resolution” and “judicial legislation.” Judges owe an obligation to extend the past in a way arbitrators and legislators do not.

Agreeing with this familiar critique of Cardozo does not establish that conventional morality should not be used in doing the interpretation required in hard cases. But it does open up this question: how are we to conceive of “the past” to which judges owe fidelity in hard cases? Should we see the obvious law that is to be extended in hard cases as (1) a reflection of the community’s moral beliefs, (2) an imposition of the law givers’ moral beliefs at the time that law was laid down, or (3) a reflection of some underlying ideal of justice, partially and somewhat inaccurately expressed by the obvious law? If it is the first, then judges might well seek to extend that past consensus by bringing it up to date with the present consensus. If it is the second, then judges might well seek to extend that past

73. CARDOZO, *supra* note 35, at 113-14.

74. Prominently including Fuller, *Fidelity*, *supra* note 1, at 667-68; DWORKIN, *supra* note 9, at 14-130.

imposition in light of those law givers' own views of what they did. If it is the third, then judges should seek to extend that attempt to capture justice with their own best insights as to what justice requires.

Which of these views to adopt should not be settled by history. It should not matter much how law givers of the past viewed what they were doing. The question for judges is a more straightforwardly normative one: how should the law that obligates them best be seen, as expression of (popular or superior) will, or as an expression of justice? In my vicarious judging—that is, my seminars in jurisprudence for judges—I never have had any doubt as to the right answer here. Judges should see law makers of the past as striving for justice and should thus join them in the task of achieving it.

(4) *Saving the formal law from itself by asking the safety valve questions of justice.* I can be brief here because the use of conventional morality to answer the safety valve questions discussed earlier makes as little sense as it does for using such morality in judicial review, and for similar reasons. Recall that safety valve questions save the obvious law from being grotesquely absurd or unjust. Nothing can save the obvious law from itself except true judgments of where justice really lies.

To see this, imagine trying to construct some formal, factual test for when safety valve questions should be asked. Warren Burger once opined that judges should ask such questions about absurd interpretations of statutes only when the legislature marks its statutes as eligible for this kind of judicial rescue.⁷⁵ Yet that would mean one is stuck with the absurdity whenever the legislature does not sense its possibility enough to so mark its work—and that is absurd. Likewise, using the social facts about what most people think is absurd or unjust to bound the use of the safety valve questions will also produce injustice and absurdity whenever popular opinion gets it wrong. The asking of safety valve questions by judges is of necessity a first person exercise in getting the morality right, not the third person exercise of piling the potential errors of conventional morality on top of the actual error contained in a literal application of the obvious law.

75. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978).

IV. THE CONTENT OF MORALITY APT FOR LAW

To say that judges and legislators should look to real morality as they do their jobs is of course not to say much until we say what kind of content such morality might have. We can narrow this question considerably if we cease talking about law in general and focus more specifically on the areas of law the subject of this conference, viz, criminal law, torts, contracts, property, constitutional law. Our question then is, what is the content of that morality that is part of these areas of law?

Even this might seem to be an unmanageably large question, but in fact the possibilities here are not numerous. To see this, let me taxonomize three possibilities, taken both from ethics generally, and from the kinds of theories typically proposed for these areas of law. My aim will be to show that, despite appearances, there are only three kinds of moral theories plausibly part of each of these areas of law.

A. Competing Theories of Ethics

It is plausible to divide ethics into aretaic and deontic theories, dealing, respectively, with virtuous character, and right and wrong actions (and the culpability with which these are done). Although aretaic theorists tend to be a bit imperialistic, regarding deontic judgments as elliptical expressions of underlying aretaic judgments, my own view is here ecumenical. A complete ethic makes both kinds of judgments, without one or the other being primary.⁷⁶

Despite this parity within ethics, I assume that it is deontic moral judgments that are of primary relevance to the law. This rather standard liberal view regards it as both undesirable and (largely) impossible to coerce virtue through law. The law does pretty well if it can induce its citizens to keep their moral obligations, to observe the social minimum of living together. Virtue is largely beyond the crude instrument of legal sanction.

76. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 52-56 (1993).

Restricting ourselves, then, to deontic moral theories, it is customary to distinguish utilitarian or other consequentialist theories, on the one hand, from deontological (or “non-consequentialist”) theories, on the other.⁷⁷ The moral landscape is a little bit more complicated than this dichotomy suggests. It is not that there is not a significant difference between consequentialist and deontological theories. There is, but there is also a significant distinction between welfare-based consequentialisms and rights or other justice-based consequentialisms. Thus, those who oppose utilitarianism to “justice theories” may have either of these distinctions in mind.

To illustrate, suppose one is contrasting utilitarian and retributivist theories of criminal law. One could be contrasting crime prevention as a welfare good, with the guilty getting their just deserts as a non-welfare good. The debate here would then be within consequentialist moral theory: punishment would be justified by its good consequences, the debate being as to which of these are better consequences. Alternatively, one could be contrasting justifying punishment institutions by their ability to produce good consequences of any kind, on the one hand, with justifying such punishment as an “agent-relative,” or “categorical duty,” irrespective of good consequences. In this latter debate, the retributivist-consequentialist who forgoes punishing some guilty persons in order to get even more guilty offenders punished is as much the opponent of the deontologist as is the more familiar utilitarian consequentialist.⁷⁸

It is plausible to think that those who design the general shape of legal institutions are necessarily consequentialist in their ethics. For such system designers necessarily adopt an agent-neutral view; such legal designers cannot justly regard *their* agency as the special source of their (“agent-relative”) obligations. This is in contrast to actors within legal systems. Such institutions may require each agent to regard her obligations as categorical, that is, not to be traded off against others keeping or not keeping their like obligations. One might thus condemn intelligence agents for justifying

77. See generally MOORE, *supra* note 44, at 680-705; see also Michael S. Moore, *Patrolling the Borders of Consequentialist Justification*, LAW & PHIL. (forthcoming 2007) (on file with author) [hereinafter Moore, *Patrolling the Borders*].

78. MOORE, *supra* note 44, at 155-59.

their killing of one innocent by that killing's prevention of more killings of innocents; one might likewise condemn those judges who lighten the punishment of one guilty person in order to induce him to turn state's witness, and thus to secure the conviction and punishment of more guilty persons. But this would be at most a kind of "government house" deontology, a "deontology" to be followed by agents because the legal institution requiring their adherence to it will produce the best consequences overall.

So at the level of justifying our general institutions of criminal, tort, property, contract, and constitutional law, I take us all to be consequentialists.⁷⁹ The interesting divide is then not that between consequentialism and deontology; the interesting divide is between welfare-oriented consequentialisms (utilitarianism) and justice-oriented consequentialisms (like retributivism, corrective justice theories, etc.).

79. For a life-long committed deontologist, this is a troublesome conclusion to reach after all these years. Yet at the level of allocating scarce social resources, I think the concession is inevitable. One way to see this is via a theistic thought experiment. Suppose there were a god, and suppose she laid down the categorical obligations of morality to each of us. (This is historically one of the arguments for God's existence. See Michael S. Moore, *Good Without God*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 221, 241-46 (Robert P. George ed., 1996).) Would it be plausible to suppose she too was bound by such categorical obligations? When deciding, say, between allocating resources to prevent serious breaches of duty, as opposed to punishing serious breaches already done, should she spend every last cent on achieving retributive justice? Surely not, and the same for human legislators.

Since I have long rejected "two-level" (or "indirect" or "rule") consequentialisms, how do I reconcile this consequentialism about institutions and resource allocation with a deontology for individual actors (including many governmental actors like judges, policemen, attorneys, etc.)? The answer lies in the shape of the deontological obligations themselves. In a sense, the imagined god (and the legislative analogue) are subject to deontological obligations—but most of their choice sets are outside the scope of such obligations. The intending/knowing, acting/omitting, doing/allowing, etc. distinctions all mark the boundaries of our categorical obligations, on the most plausible version of deontology. See Moore, *Patrolling the Borders*, *supra* note 77. And the resource allocation decisions imagined above all fall on the knowing-omitting-allowing side of the line, which places them outside of categorical obligation and thus subject to a background consequentialism.

(This is probably not worked out enough to be seen as satisfactory, but Leo Katz said I had to say something here.)

*B. Competing Ethical Ideals in Five Areas of Law**1. Criminal Law*

Let me now leave the taxonomizing of moral theories in ethics for the taxonomizing of justificatory theories typically given in our five areas of law. Take criminal law first. It is standard fare in the philosophy of punishment to lump incapacitation theories, general and special deterrence theories, moral education theories (including expressivism when it lapses into occasional clarity), social cohesion theories, and prevention of private revenge theories, into one kind of moral theory, a utilitarian theory.⁸⁰ These are largely, although not exclusively, crime prevention theories, so that the negative welfare caused by punishment is justified by the positive welfare produced by prevention of future crime, including the crimes of would-be vigilantes. The usual opponents of utilitarian theories of punishment are retributivist theories, according to which criminal punishment is justified by the inherent justice of giving offenders the harsh treatment that they deserve. For retributivists, punishment is not an evil justified only by its production of greater good; rather, punishment of deserving offenders is an intrinsic good in its own right.⁸¹

For much of the twentieth century the standard educated view was to tout a third theory of punishment, often going under the name of the rehabilitative ideal. On this view, *punishment* is replaced with *treatment* of offenders. The justification for such treatment was not crime prevention—that is just a utilitarian calculation that reform is cheaper than incapacitation in reducing crime. Rather, it was the good of the offender that is served by the expenditure of social resources for such treatment. Because offenders rarely choose to undertake such treatment voluntarily, the theory was necessarily paternalistic in its forcing of such treatment on offenders.⁸²

80. For a longer version of lumping such theories together as utilitarian, see MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 233-37 (1984).

81. *Id.* at 235-37.

82. *Id.* at 234-35.

The rehabilitative ideal has come and gone in criminal law theory.⁸³ It is worth pausing to see why this is so. To begin with, notice that the rehabilitative ideal never was, and never could be, a theory of criminal law and of punishment. Rather, it is/was an ideal recommending the *replacement* of criminal law and its punishment institutions with something else—a treatment system for the “social disease” known as crime. Secondly, but relatedly, notice also that the rehabilitative ideal is but an offshoot of a much more general kind of justice—not retributive, but distributive, justice. It is a hallmark of distributive justice that its desert base is *not* what someone has done, still less who they are (in terms of character). Rather, the desert base for a distributive justice claim (in its non-Rawlsian form where there is such a thing as pre-institutional desert) is simply (1) that one is a person and (2) that one has less of some good than the equality of persons would mandate. It should thus come as no surprise that this distributive justice ideal does not justify, but rejects, a criminal law that (1) triggers state concern by what one has done and not simply on one’s status as a person with less, and (2) gives suffering (rather than benefit) to those who are often already less well off than their fellow persons.⁸⁴

We end up, then, with two sorts of theories of the criminal law. One justifies the criminal law by its ability to enhance welfare; the other, by its ability to realize one kind of justice, retributive justice. In addition, in the spoiler role is a third theory, a theory not of the criminal law but one urging abolition of the criminal law. This, too, is a justice theory, but the kind of justice served is distributive justice.

This pattern repeats itself for three of the other areas of law. In all three areas, utilitarianism remains one of the two main contenders as a theory for each area of law. The economists have perhaps made this a little more difficult to see, with their sometimes insistence that they are not utilitarian (and thus not subject to the well-charted worries about utilitarianism).⁸⁵ Yet if one starts

83. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

84. See MOORE, *supra* note 80, at 104-52.

85. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 48-87 (1981) (seeking to

with a classical utilitarian like Jeremy Bentham,⁸⁶ and adds (1) a substitution of Mill's preference-satisfaction for Bentham's pleasure as the form of welfare to be maximized;⁸⁷ (2) a substitution of Pareto's ordinal comparisons of utility for Bentham's cardinal utility comparisons;⁸⁸ and (3) a behaviorism in which stable trade points in costless markets are taken to fix Pareto-optimal points, in lieu of Bentham's phenomenological intensity measures; then one ends up with a welfare economics that is a recognizable form of utilitarianism. I thus lump the economic theory of torts, contracts, and property together as but a variant of the utilitarian theory of those areas of law.

2. Torts

The justice theories of torts, contracts, and property are more diverse. Take torts first. The standard triad of theories in torts are often labeled "the economic theory," "the fault principle," and "the compensation principle." The economic theory of torts now comes in many variations. From 1920 to 1960 Pigouvian welfare economics held that goods and activities had to reflect their "true costs" in order to achieve efficient resource allocation, and that any harmful consequence of an activity was such a true cost.⁸⁹ These ideas lead to the recommendation of strict liability for such activities, as the means for them to "internalize" such costs. Coase destroyed this idea with the point that, in costless markets, harms caused to others were always a cost of the activity causing them because of the foregone opportunity of the harm-causer to extract a payment from

distinguish wealth maximization from utilitarianism).

86. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hofner Press 1948) (1789).

87. See generally J.S. MILL, UTILITARIANISM (Roger Crisp ed., Oxford Univ. Press 1998) (1861).

88. The "ordinal revolution" began in Pareto. See generally VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (Ann. S. Schwier & Alfred N. Page eds., Ann. S. Schwer trans., Augustus M. Kelley Publishers 1971) (1927); see also Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817 (1989).

89. See generally ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1920). For a late expression of Pigouvian welfare economics applied to tort law, see Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

the harm sufferers not to engage in the activity causing the harm.⁹⁰ Post-Coasean theories have treated tort liability rules as either: prods to efficient market behavior by those best positioned to engage in it; entitlement rules of maximal clarity to allow efficient market behavior; or rough guesses as to where a market would come out if the transaction costs were not so high.⁹¹ These recommended rules are much more interestingly diverse than Pigou's univocal recommendation of strict liability for causing harm.

All of these are recognizable versions of utilitarianism, for all seek to enhance the net welfare of society by the appropriate placement of tort liability. What of the other two kinds of tort theories? "Fault" is a misleading name for corrective justice theories. It is a misleading label, because there are recognizably corrective justice theories of torts which do not use fault as the trigger for liability, but use causation without fault, or unjust enrichment without fault, as their triggering rationales.⁹² Corrective justice is a better label than fault, for it captures the salient features of this kind of justice-oriented theory of torts.

If I come into your house and deliberately smash your rare Ming vase for no good reason, I have violated a primary moral duty I have not to damage your property. It is plausible to think that by breaching this primary duty I have created a secondary duty for myself, namely, to correct as best I can this breach. I have in other words, a moral duty to correct the injustice that I have caused. The corrective justice theory of torts holds that a kind of justice is realized if I do such corrections and that the purpose of liability rules is to force me to do so.⁹³

Notice how different the corrective justice theory is from the utilitarian theory. In utilitarian theories, tort law is used to induce efficient behavior that makes us all better off. Compensating the harm-sufferer is good only instrumentally to something that is good

90. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

91. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135-73 (1970).

92. An example of each is provided by the early theories of Richard Epstein, Jules Coleman, and George Fletcher. See Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

93. See Coleman, Epstein, and Fletcher, *supra* note 92.

intrinsically, namely, the enhancement of social welfare.⁹⁴ Whereas in corrective justice it is intrinsically good that the harm-causer compensate the harm-sufferer. It may be that this good actually retards welfare, but that is by-the-by in a corrective justice theory.

Notice also that corrective justice differs from retributive justice. For one thing, the triggers for legal liability differ because the desert base differs. If one tries to harm another, or knowingly risks harming another, without that other knowing of it, such attempting or risking is a plausible basis for moral blame and retributive punishment.⁹⁵ But it is not a plausible basis for requiring corrective justice, because without successful wrongdoing there is nothing to correct. More importantly, the secondary duties are different between the two kinds of justice. Corrective justice requires culpable wrongdoers to make their victims whole to the extent they can; the secondary duty is focused on the victim's injured state.⁹⁶ Retributive justice, by contrast, focuses on the offender's state; his duty is to suffer a set back to his interests.⁹⁷ While we can imagine cases where the very same post-injury action by the wrongdoer both compensates the victim adequately and punishes the wrongdoer appropriately, there is no necessary correlation between these two states of affairs. Often, "making amends" by compensation is not enough punishment (as where there is no harm); sometimes making such amends is more than the punishment one deserves (as in cases of extensive harm).

Corrective justice also differs from distributive justice. One can imagine what a distributive justice claim would look like for the smashed Ming vase mentioned above: if everyone in society has one but you do not, then you deserve one too on distributive justice grounds.⁹⁸ It does not matter for these purposes how you lost your vase, or whether you ever had one; you do not have what everyone else has and you are entitled to equal resources as a person, on distributive justice grounds. So everyone else should kick in a little bit, via the tax system, to buy you one.

94. See MOORE, *supra* note 44, at 107.

95. Although for those of us who believe in moral luck, the blame and the punishment are less for attempting or risking, than for causing unjustified harm. See *id.* at 191-247.

96. See Coleman, Epstein and Fletcher, *supra* note 92.

97. See MOORE, *supra* note 44, at 104-10.

98. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

Notice three differences with the corrective justice claim for the vase. One is the desert base: being a person with less is enough for a distributive justice claim, whereas for a corrective justice claim that pattern of distribution is irrelevant.⁹⁹ What grounds the corrective justice claim is your ownership of the vase and my culpable wrongdoing in smashing it. Second, the weakness of the distributive justice claim for the Ming vase reveals a limitation on such claims not present in a corrective justice claim. Ming vases are not very high on the list of human needs, so that an unequal distribution of them presents a less pressing case of distributive injustice than an unequal distribution of food, shelter, education, health services, and the like. Whereas corrective justice is blind to these differences: if the vase was yours, you have a corrective justice claim to have it or its value returned to you irrespective of its trivial effect on your basic needs.

Thirdly, corrective justice is inherently a two-party affair. *I* have a duty to correct *my* unjust action. Someone else compensating you does not satisfy my corrective justice duty.¹⁰⁰ Moreover, anyone else who is dragooned into compensating you for your vase has a complaint on corrective justice grounds, just as an innocent wrongfully punished has a complaint on retributive justice grounds. In each case, the one forced to compensate or to suffer does not deserve it as a matter of corrective or retributive justice. For both these reasons, anyone proposing a separation of the victim's right to be compensated, from the wrongdoer's duty to compensate, has left corrective justice for something else.¹⁰¹

This last discussion allows us to see clearly the true nature of the third major kind of theory of torts, the one labeled "compensation." This is in truth a distributive justice theory. It proceeds on the assumption that no one should face alone the downside risks of living together in society, that we all have a duty to redistribute those harms from those on whom nature's lottery has placed them, to all of us collectively.¹⁰² It matters not how one was hurt, on this

99. See, e.g., Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 239-63 (Jeremy Horder ed., 2000).

100. See Epstein, *supra* note 92.

101. Coleman early on seems to make this mistake. See *id.*

102. See generally RAWLS, *supra* note 98.

distributive justice theory, but only that one was hurt when others were not.

Just as the distributive justice basis of the rehabilitative ideal disqualifies it as a theory of the criminal law, so the distributive justice basis of the compensation ideal of torts disqualifies it as a theory of tort law. The scheme of social insurance that this rationale would justify is not a tort system at all, as Holmes recognized long ago; it is an alternative to tort law.¹⁰³ The New Zealand social insurance scheme, and workmen's compensation and no-fault automobile accident schemes in the United States, are usually seen quite accurately in this light.¹⁰⁴

Torts thus repeats the pattern of criminal law. Two kinds of theories compete as theories of torts, utilitarianism and a justice theory, in this case corrective rather than retributive justice. Distributive justice again plays the spoiler role, urging an alternative to the tort system, not a justification for the system we have.

3. Distributive Justice in Contracts and Property

Property and contract reveal the same basic pattern, but with this difference: for these areas of law, what distributive justice recommends is so removed from the shape of the doctrines in property and contract that there is nothing like the rehabilitative ideal or the compensation principle even parading itself as a theory of these areas of law. Distributive justice is the flat out enemy of property rights ("property is theft," and all that), as Bob Nozick sought to show in detail.¹⁰⁵ Distributive justice also has no truck with the property-like rights conferred on the promisee of a contract. To distributive justice, contract rights look like incipient property rights and are equally antithetical to entitlements based on needs.

103. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77-78 (Little, Brown & Co. 1923) (1881).

104. See, e.g., James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981) (reviewing GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY* (1979)).

105. Nozick was talking about what he called "patterned principles of distributive justice," which I take to be essential to distributive justice as such. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 168 (1974).

It is not that distributive justice does not have an impact on property and contract doctrines. The revolution in landlord/tenant law in America in the sixties and seventies, for example, was based on distributive justice notions. As one of those revolutionaries, J. Skelly Wright, confessed, he came to Washington, D.C. from Baton Rouge and noticed two things about the residential rental market in the District: the tenants were poor and black, and the landlords were rich and white, and he vowed to do something about that.¹⁰⁶ Rent control ordinances and certain use restrictions (such as those of the California Coastal Commission) are similarly motivated.¹⁰⁷ A similar motivation appears behind substantive unconscionability doctrines in contract law, as well as behind the imposition of non-waivable, implied terms.

But these are isolated intrusions of distributive justice into property and contract. These isolated intrusions do not add up to a systemic replacement of property/contract regimes with some alternative regime that would be close enough to what we have that one might (mis)name it a theory of property, or a theory of contracts. Perhaps this is because in our system of law the systematic impact of distributive justice ideals on property and contract rights has by happenstance been put elsewhere, in the progressive income tax. But more important, I think, is the more blatantly hostile attitude to property and contract within the distributive justice ideal itself.

4. The Promissory Theory of Contract

Apart from the diminished role of distributive justice in contract and property, there is otherwise the same competition between utilitarianism and justice theories as there is in criminal law and torts. The only difference is that for property and contract, utilitarianism is more predominant than it is in criminal law or torts. The reason for this begins with the fact that most justice theorists are also what we might call background utilitarians. That is, if one's justice theory imposes no obligations or permissions on some topic,

106. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984) (letter from Judge J. Skelly Wright to Professor Edward Rabin).

107. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

then other things equal, it is good to enhance welfare, just as utilitarianism suggests. Utilitarianism is in that sense always there, in the background so to speak.¹⁰⁸ Utilitarianism thus comes into the foreground when justice theories are implausible or weak. Such is the case here, particularly with contracts.

One way to construct a justice-oriented theory of contracts is to fold such a theory into the big tent of corrective justice. On this view, contract law exists to force people to correct the injustice of breaching their primary obligations to others, in the special case where those primary obligations are based on a promise (rather than existing generically between persons, as in tort). This view analogizes breach of contract to torts. Take the closely related tort of promissory fraud, in which the wrongdoer promises something with no intention of delivering on the promise. In most states such misrepresentation of intention is actionable as a tort. On the corrective justice view of contract, breach of promise is just a temporally segmented, but otherwise analogous, tort: the combination of two things done at different times—the making of the promise (even with the intention to keep it) and the subsequent breach—has unjustly caused the promisee harm, which the promisor owes a duty of justice to correct.

A large problem with this corrective justice view of contracts is that it does not square easily with the legal regime of Anglo-American contract doctrine. I refer to the Anglo-American remedy for breach, which is either a decree of specific performance or damages measured by the net value of the promised performance to the promisee. On a true corrective justice view, the wrongfully breaching promisor should restore her promisee to the status quo ante. This would justify reliance damages (including lost opportunities), but not specific performance or benefit-of-the-bargain damages. A fundamental feature of our contract law is that it forces people to keep their promises (either literally or with the monetary equivalent), whereas corrective justice would only require them to restore the world to where it was before they wrongfully changed it by promising-and-then-breaching.

108. See Moore, *Patrolling the Borders*, *supra* note 77.

Seeing this reveals the possibility of a justice-oriented theory of contracts that is not a corrective justice theory. Indeed, what are often called "promissory theories of contract," like Charles Fried's,¹⁰⁹ are typically not corrective justice theories. To understand such theories, start with a traditional view within ethics about the primary duty to keep one's promises. On the traditional view, promising is the execution of a normative power: we create an obligation by the act of promising.¹¹⁰ Moreover, unlike obligations created by mere vows or requests of friends, this is a very strong obligation. From Kant to Rawls,¹¹¹ keeping one's promise is a textbook example of strong, categorical obligation we each have.

Breaching a promise is thus, on this view, a big deal morally. If legal moralism is correct with regard to criminal legislation, it is then quite a puzzle why breach of promise is not criminalized. The answer could be because contract law effectively prevents there from being any breach. By its remedies, contract law ensures that promises are kept—albeit later than they should be, and sometimes only with the monetary equivalence of performance. But still, they are kept. Surely, this view would contend, if we could do this for other serious moral breaches, we would. Retributive justice may be a true kind of justice, but it would be strange to think that a just punishment of a serious moral breach is to be preferred to there being no such breach to start with. Quite the reverse is true: if we can prevent such breaches, that is better than after the fact punishment, no matter how just.¹¹²

The unfortunate fact is that we cannot prevent completed crimes by judicial decrees. Death and personal injury have happened, and like the proverbial broken egg, when it has happened there is no going back to undo it. But with broken promises there is. Contract law prevents anything other than temporary breaches, forestalling the need for retributive punishment. One could thus call this promissory theory, the preventative retributive theory of contracts.

109. See CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

110. See J. Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY* 210, 210-28 (P.M.S. Hacker & J. Raz, eds., 1977).

111. See IMMANUEL KANT, *THE MORAL LAW: GROUNDWORK OF THE METAPHYSIC OF MORALS* 70-71 (H.J. Paton ed. & trans., Harper & Row 3d ed.1964); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

112. Thus, the resource allocation consequentialism mentioned earlier. See *supra* note 79.

I sketch this justice-oriented theory in such detail not because I believe it. On the contrary, the view is broken-backed from the beginning: keeping one's promise is not plausibly a stringent moral obligation.¹¹³ In my view, it is right down there (not up there) with lying. But this is the kind of view that *would* justify the contract law we have. Ergo, the weakness of any justice-oriented alternative to utilitarianism as a viable theory of contracts.

5. *Natural Rights Theories of Property*

Justice-oriented theories of property are not quite in such bad shape. There are two lead candidates here: the personality theory as it has descended down to us from Hegel,¹¹⁴ and the labor theory of Locke¹¹⁵ and his descendants, modern Lockeans like Nozick¹¹⁶ and (most of the time) Epstein.¹¹⁷ Consider the personality theory first. Putting aside Hegel's own rather vague but suggestive formulations, and focusing on Peggy Radin's modern restatement of the view,¹¹⁸ the personality theory holds that we constitute ourselves as persons through ownership of property. It is things that allow us to draw self-boundaries as infants, it is ownership of things that (with their permanence) serve as mnemonic devices connecting our past to our future via our memory, it is ownership of things that expresses our personality and character-structure, and it is ownership of things that expands our physical selves beyond our bodies to our clothes, our canes, our chairs, etc.

This is surely a weak justificatory scheme for property law. To begin with, as Radin recognizes, it applies only to a tiny fraction of what we think of as property; she labels as "personal property" things like heirlooms, homes, clothes, and, in Southern California's car culture, BMW's. She realizes that most property is "fungible" property for which no such personality justification is plausible.¹¹⁹

113. See Heidi Hurd, *Promises/Schmomises* (forthcoming) (on file with author).

114. See GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* 21-31 (1952).

115. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 25-31 (J.W. Gough ed., Barnes & Noble 1966) (1690).

116. See NOZICK, *supra* note 105, at 174-82.

117. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

118. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

119. See *id.* at 991-1013.

Secondly, even within the narrow confines of personal property, property rights, like promissory rights, are moral light-weights. The English novelist, Morgan Forster, had a healthier view about ownership of property.¹²⁰ About some woods he had purchased, he mused that property holdings are encumbrances to our living well, what with their shallow preoccupations which pretend to a significance that they do not possess.

The Lockean labor theory is better. In its limited domain Locke's famous argument for why one is justified in the exclusive rights of private property is still persuasive today. You remember: Locke starts with the communist premise that God gave the world to mankind in common;¹²¹ yet the exception was we each own our bodies and therefore the labor of them.¹²² When we mix our bodies and their labor with external things, those too become ours,¹²³ so as long as we leave "as much and as good" for others to do likewise.¹²⁴ Because of the equal opportunity of others to labor and also enrich themselves,¹²⁵ if we do so and they do not it is just that we keep the fruits of our labor (so long as we do not waste them),¹²⁶ and the non-laboring, free-riding others do not share.

Confined to situations where the mixing is really a creating of something new, and where the first proviso is truly satisfied, Locke is pretty persuasive, is he not? If I write a novel, by natural right it is my (intellectual) property, to do with pretty much as I please, including, like Kafka, to destroy it.¹²⁷ But: (1) this does not go very far, inasmuch as in an industrialized society, most kinds of property are held by non-Lockean laborers who hold title derivatively because of transfers by others; and (2) even in the paradigm cases where something new is created out of abundant materials equally available to all, there are cases like Nozick's medical researcher who

120. E.M. Forster, *My Wood*, in *ABINGER HARVEST* 22 (1936).

121. See LOCKE, *supra* note 115, § 26.

122. *Id.* §§ 27, 44.

123. *Id.*

124. *Id.* § 32.

125. *Id.* § 34.

126. *Id.* § 31.

127. Kafka ordered his literary executor, Max Brod, to burn his unpublished writings, as Brod tells us in his postscript to one of the manuscripts he was supposed to burn. See Max Brod, *Postscript to the First Edition of FRANZ KAFKA'S THE TRIAL*, at 328 (Willa & Edwin Muir trans., E.M. Butler ed. & trans., Alfred A. Knopf 1959) (1925).

discovers a breakthrough cure for cancer all by himself.¹²⁸ Surely such cases present strong moral limits on the exclusivity distinctive of property rights.

Property thus joins contract as lacking a generally persuasive justice theory. Because the justice theories of property and contract are as weak as they are, utilitarianism is a more dominant theory here than it is for criminal law or torts.

6. *Constitutional Law*

Constitutional law may seem to be the odd man out here, for nothing in what is usually called a theory of constitutional law seemingly tracks the tripartite division into which we can place theories of tort, contract, property, and criminal law. There are to be sure substantively moral theories of constitutional law that discover the theorist's preferred value scheme in the text of the United States Constitution, and some of those preferred value schemes track the divisions we earlier encountered—there is the libertarian constitution of Nozickian libertarians,¹²⁹ there is the egalitarian constitution of Rawlsian egalitarians,¹³⁰ etc. Yet there are also substantive theories of the United States Constitution that do not track the tripartite division, such as David A.J. Richard's theory that liberal tolerance is the dominant theme of the text,¹³¹ or

128. See NOZICK, *supra* note 105, at 181. Nozick's "medical researcher who synthesizes a new substance that effectively treats a certain disease" became more than a philosophy professor's hypothetical. In 1990, on the backside of Kilimanjaro at 15,000 feet a local porter was afflicted with pulmonary edema; he could not be lowered because of darkness and cliffs below. Two U.S. doctors possessed an experimental drug, non-FDA approved and unavailable in the United States; the drug was developed to drain the lungs of someone afflicted with pulmonary edema. The doctors, husband and wife, members of a fifteen-person climbing team, had only two doses of the drug, which they had taken considerable trouble to obtain for their own use should they become afflicted with pulmonary edema. (They were not doctors explicitly assigned to be the team doctor, nor did the team doctor's medical kit include the experimental drug.) Reciting that their labor and ingenuity had left "as much, and as good" for others, they refused to give up the drug, even at the probable cost of the porter's life. The five lawyers who were a part of the climbing team (including Michael Moore and Heidi Hurd) disagreed. My sense was (and is) that they were obligated to give up the fruits of their labor, no matter how satisfied might be Locke's argument for just acquisition of a property right in the drug.

129. See generally, *e.g.*, RICHARD EPSTEIN, *TAKINGS* (1985).

130. See, *e.g.*, RONALD DWORKIN, *SOVEREIGN VIRTUE* 112-43 (2000).

131. See generally DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

John Hart Ely's reading that democracy fundamentally animates the document,¹³² etc.

When constitutional theorists are not pressing such substantive agendas—when they are, in their own terminology, “clause-bound” theorists—what seems central to the practice of constitutional theory, as American scholars practice it, are four questions: (1) What is the text of the United States Constitution—the document, Supreme Court precedent, contemporary public consciousness, original understanding, etc.? (2) Why is such a text authoritative for judges and citizens? (3) How is such a text to be interpreted? And, building on the answers to the previous three questions, (4) how can one justify the “great power” of judicial review according to which the judges’ view of the Constitution prevails over the view of it held by a majority of citizens and by their elected representatives? It seems every generation of American constitutional theorists has to answer anew the challenge to democratic self-governance presented by judicial review. The question, including the sub-questions (1) to (3) above, is central to what we call constitutional theory in America.

In this central question of the legitimacy of judicial review, one can see some expression of the opposition we have seen before, that between utilitarianism and justice theories. Democratically selected legislation is likely welfare-enhancing (at least in a preference-satisfaction sense of welfare), and a democratically selected legislature is often pictured as essentially utilitarian in its reasonings. By contrast, courts are often pictured as principled in the sense that they focus on principles of justice in their constitutional interpretations.¹³³ This is particularly true for the rights-protecting half of the courts’ constitutional work, as opposed to the division of powers umpiring, which is the other half. We often conceptualize and justify judicial review as the courts’ protection of natural rights against the unjust use of individuals by the utilitarian legislature.¹³⁴

132. See generally ELY, *supra* note 68.

133. Most famously, as in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See also Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

134. See Wechsler, *supra* note 133.

This picture is of course overly simple on both sides of the comparison. Legislatures, as Jeremy Waldron has of late been at such pains to point out, are not necessarily and not always utilitarian in their reasonings or their results.¹³⁵ They too, like the courts, can and do worry about treading on the natural rights of citizens. And courts are not purely forums of principle, nor is constitutional adjudication concerned exclusively with protection of rights or justice more generally. Still, there is enough truth to the equation of ordinary politics with utilitarianism, and to the equation of “framework politics” (that is, constitutional law) with justice, that some semblance of this opposition can be seen in constitutional law too.

C. Picking the Best Morality for Discrete Areas of Law

To say more about each of these five areas of law would be to intrude upon the body of this conference itself. I take it that as we go through each of these five areas of law a central concern is to assess whether torts, say, is really about corrective justice, efficiency, compensation, or something else; whether each of the others is really about utility, justice, equality, etc. Having taught all five areas of law as first year courses many times, I do not lack views here; but the conference participants are the ones to explore this in detail, not me.

However, perhaps this introduction can be helpful in separating some questions. We might separate out four kinds of questions we could ask about each area of law and the moral ideals that are arguably a part of it. The first is the purely descriptive, doctrinal question: do the institutional details seem to realize one ideal better than the other? This is a matter of extrapolating from legal doctrines, the values they could sensibly serve, given those doctrines' contents.¹³⁶ Second is a purely ethical question: are these

135. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 164-87 (1999). My own view is that democratic legislators tend to be utilitarian in their reasonings, for reasons mentioned in Moore, *Justifying the Natural Law Theory*, *supra* note 5. Chapter Eight of Waldron's book, and my last cited article, arose out of a formal debate on this matter he and I engaged in at the University of Pennsylvania in 1995.

136. This is what some judges, such as Felix Frankfurter, called finding the “intention *in*” a legal doctrine (not to be confused with the actual intention held by any law maker). See

different ideals truly valuable? Is utilitarianism, for example, so crippled by its many well-charted difficulties in ethics that it could not be a valid goal of law in these areas?¹³⁷ Thirdly, and building on the first two questions, there is the question of the unique good or function served by each of these areas of law: can one identify what each of these areas of law is uniquely good for, what might be its purpose, in the sense of function?¹³⁸ Are the kinds of justice, for example, served one-to-one by a kind of law? Fourthly, there is a causal, explanatory question: did belief in certain of these ideals cause the formation of the doctrines we possess in each of these five areas of law? Was it some half-conscious belief in economic efficiency, for example, that caused judges to decide negligence cases in the way they did one hundred years ago?¹³⁹

A "theory" of an area of law is often a blend of these descriptive, evaluative, interpretive, and explanatory questions. Theorists like myself would of course like it if their favored theories—say, retributivism about criminal law—made maximal moral sense of the doctrines we have, point to something of real value, show that value to be uniquely served by this area of law, and showed how belief in such value caused us to have the doctrines that we do.¹⁴⁰ But theories can be valuable without such total victory. We should be interested in hearing where theorists of the different areas of law come out, even on a piecemeal basis.

Moore, *Semantics*, *supra* note 5, at 258-63.

137. For a good survey of problems, see ANTHONY QUINTON, *UTILITARIAN ETHICS* (1973).

138. I explore what it means to attribute functions to law in MICHAEL S. MOORE, *Law as a Functional Kind*, in *NATURAL LAW THEORIES* (R. George ed. 1992), reprinted in *EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE* 294-332 (2000). I explore what it means to attribute functions to areas of law in MICHAEL MOORE, *A Theory of Criminal Law Theories*, in *TEL AVIV STUDIES IN LEGAL THEORY* (D. Fridmann, ed., 1990), reprinted in MOORE, *supra* note 44, at 3-80. I explore what it means to attribute functions to particular laws in Moore, *Semantics*, *supra* note 5, at 262-65.

139. Arguably Richard Posner's early thesis. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

140. These are roughly the conclusions about retributivism and the criminal law of MOORE, *supra* note 44.

CONCLUSION

Suppose law had no connection to morality. Suppose, that is, that Bentham wrote his ideal code and it was both complete and consistent.¹⁴¹ Suppose Stephen had his way over Mill,¹⁴² Devlin over Hart,¹⁴³ so that the content of the law we ought to have is fully determined by what a majority of citizens wants. Then to know the law, as a judge, lawyer, citizen, or scholar, is to know history—the history of institutional detail of a certain sort. Then to know what ought to be made law as a legislator is to know the results of the most accurate opinion surveys. Then to teach the (contract, torts, etc.) law we have or ought to have, would be to teach these facts of institutional and social history, period.

What a bore! It is morality in the law that makes law worthy of our intelligence and our interest. It is the morality in the law that makes the philosophy of law truly philosophical—and not the butt of Clemenceau-like comparisons to military music.¹⁴⁴ I left public international law as an undergraduate once I discovered its obsession with the history of treaties; I left the practice of tax law once I discovered its immersion in the details of the legal labyrinth known as the Internal Revenue Code, the Regulations, and the case decisions. Imagine if all law were truly like that. I don't know about you, but I would find something else to do.

141. *See supra* text accompanying note 11.

142. *See supra* text accompanying note 44.

143. *See supra* text accompanying note 62.

144. Roughly, military justice stands to real justice as military music stands to real music.